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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1625

IMAGE CARRIER CORPORATION,
HOUSE OF LITHOGRAPHY, INC.,
ASSOCIATED LITHO AND LETTERING
SERVICE, INC.,

Petitioners,

v.

EDWARD I. KOCH,
MAYOR OF NEW YORK CITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The National Association of Manufacturers hereby respectfully moves for leave to file the accompanying brief as *amicus curiae* in this case. Consent was sought from all parties. The Mayor of New York City, *et. al.*, respondents, and the petitioners gave their permission. The intervenors below did not. All of these documents have been filed with the clerk.

The National Association of Manufacturers (NAM) is a non-profit voluntary business association, organized as a membership corporation under the laws of the State of New York. It is composed of over 12,500 manufacturing and related concerns, eighty percent of which have 500 or fewer employees, located throughout the United States. The NAM, therefore, represents a substantial number of the nation's industrial employers who employ, in the aggregate, over 15 million employees or roughly seventy-eight percent of all employees employed in manufacturing nationwide. Furthermore, a significant number of NAM's members, many of whom look to government contracting work for necessary income, maintain business operations which are predominantly non-union.

NAM is firmly committed to the principle that every employee and prospective employee should be guaranteed freedom, without intimidation or coercion from any source, to join or not join a labor organization and to maintain or discontinue his membership and participation in its activities. The Second Circuit Court of Appeals'* approval of New York City's restrictive bidding and contracting policy represents a direct threat to the continued viability of this principle because it seriously undermines the freedom of choice which should be available to all employees with respect to their decision to join, *or refrain from joining*, a union.

Both fairness and law dictate that government play a neutral role in this decision-making process. A public policy which penalizes non-union employers and employees by arbitrarily discriminating between union and non-union employers in the awarding of government contracts all but destroys this neutrality by unfairly and unjustifiably tipping the balance in favor of unionization. While there may well be a legitimate federal and state interest in fostering collective

*The decision below is reported at 567 F.2d 1197.

bargaining, the promotion of that interest must necessarily await the exercise of a free choice by the relevant parties. Because this nation's labor laws guarantee the exercise of such a choice free from inappropriate governmental intervention, the decision below is contrary to national labor policy.

Just as importantly, nothing contained in the decision below in any way limits its applicability to either the printing industry or to New York City. In large part the court below justifies its affirmance of New York City's restrictive policy on the notion that such a requirement does indeed foster collective bargaining. Should the decision below remain intact, then little would stand in the way of an endless proliferation of similar requirements in other localities and for other industries. We need not dwell on the decidedly adverse effects these requirements would have on non-union manufacturers who hope to perform government work in such jurisdictions. For many, their continued economic viability may be in serious jeopardy.

Based on the foregoing, we submit that NAM quite clearly has a vital interest in the outcome of the instant litigation. Furthermore, we believe the views of NAM, its experience with the critical issues involved herein, and its general business expertise may be of assistance to this Court.

Accordingly the NAM urges that leave be granted to file the accompanying brief as *amicus curiae* and respectfully so moves this Court.

Respectfully submitted,

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA

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INTEREST OF AMICUS CURIAE

The interest of the National Association of Manufacturers in this case is set forth in the foregoing Motion for Leave to File Brief Amicus Curiae.

REASONS FOR GRANTING THE WRIT

The decision below in essence holds that a local governmental authority may lawfully restrict the acceptance of bids for and the awarding of government contracts to unionized employers. The Second Circuit's decision thus

raises important questions concerning the extent to which public bodies may interfere with the otherwise free exercise of rights protected by our national labor policy. Of equal import are the questions raised by this decision relative to the proper scope and applicability of protections against state action afforded by the Fourteenth Amendment to the United States Constitution. Because of the importance of these questions to the identification of the proper role to be played by local government in federally regulated areas of labor management relations, and because of the potentially far reaching impact of the decision below, we submit that a resolution by this Court of the significant issues raised herein is both warranted and necessary.

I. The Decision of The Second Circuit Is At Variance With This Court's Pronouncements Concerning The Scope Of The Federal Labor Law Pre-Emption Doctrine

In upholding Respondent's restrictive contracting practices, the Second Circuit paid little attention to those decisions of this Court which define the scope and force of the Federal Labor Law Pre-Emption doctrine. Not surprisingly, therefore, the decision below ignores the fundamental tenet of the doctrine which this Court has unequivocally applied.

> The National Labor Relations Act is a comprehensive code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce. As such, it is of course the law of the land which no state law can modify or repeal. *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967).

This Court has held that if the conduct under analysis is neither protected nor prohibited by the National Labor Relations Act, *as amended* (hereinafter "NLRA") 29 U.S.C. §§141 et seq., the question becomes whether

"Congress has occupied the field and closed it to State regulation." *Teamsters Local 20 v. Morton*, 377 U.S. 252, 258, (1964). The absence of specific legislative enactments on every conceivable labor relations issue does not serve as a Congressional invitation to the States to regulate any particular aspect of the field. If the area as a whole requires uniformity, Congressional silence may be indicative of an intent to leave that particular aspect to the control of "the free-play of economic forces." *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971).

The Respondents' restrictive contracting practices[1] directly infringe upon an employee's federally protected right to freely choose between union representation and remaining non-union.[2] The entire scheme of the NLRA is designed to insulate this decision-making process from unwarranted intrusions by labor or management and, although not specifically stated, it must necessarily follow that governmental bodies are likewise precluded from interfering with an employee's exercise of this right. *Cf. Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 149-150 (1976). Federal labor policy does not and should not favor governmentally induced unionism.

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[1]The restrictive Mayoral Order is set forth in relevant part at page 4 of the Petition For A Writ of Certiorari.

[2]Section 7 of the NLRA (29 U.S.C. §157) provides as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. (Emphasis added.)

By restricting the award of municipal printing contracts to shops which are authorized to display the union label, the Mayoral Order denies the employees of open shops the opportunity to work on city printing projects. This blatant intrusion upon an employee's fundamental right to reject unionization finds no approval in either the NLRA or in legislative history. Had the Mayoral Order made non-union status a condition for bidding on and performing city printing contracts, the arguments against such a requirement would be equally compelling. But the Second Circuit's decision all but ignores this irreconcilable conflict between the Mayoral Order and the Section 7 rights of employees.

Rather, the court below sought to minimize the impact of New York City's restrictive policy on employees' Section 7 rights by pointing out that neither the City's resolution nor its policy memoranda and bidding instructions implementing the Mayoral Order require any employee to join a union, and that the City's policy merely "prefers" union shops to non-union shops. While it is true that the literal wording of the order does not command all printing employees to join unions, to characterize the City's policy as merely a "preference" is to dramatically understate its practical impact. Quite clearly the City's policy operates as a blanket exclusion of open shop employers from the municipal contracting process thereby depriving non-union employers and employees alike of the benefits which might otherwise naturally flow from such contracts. Contrary to the apparent belief of the court below, we submit that there is a significant difference between preferential treatment and a blanket exclusion, and the lower court's failure to so recognize represents nothing more than an elevation of form over substance.[3]

[3]The Second Circuit found further support for its conclusion in its finding that the City's flat-form printing needs are not substantial enough to have even an *indirect coercive effect* on the exercise of Section 7 rights by employees. The error in this analysis is, of course, that it

Furthermore, it should not escape this Court's attention that the restrictive contracting practices also have a chilling effect upon the employees' right to decertify their bargaining representative pursuant to Section 9(c)(1)(A)(ii), (29 U.S.C. §159(c)(1)(A)(ii)) of the NLRA. The prospect that work previously awarded to their employer may be withdrawn or that otherwise available contracts could be withheld should a successful decertification be accomplished is a sobering consideration, especially where the loss of a contract could mean the loss of their jobs.

Since the Mayoral Order has a "direct tendency to frustrate the purpose of Congress", *Nash v. Florida Industrial Commission, supra,* at 239, and "creates a substantial risk of conflict with policies central to the federal labor law", *Connell Construction Co., Inc., v. Plumbers & Steamfitters Local 100,* 421 U.S. 616, 636 (1975), such governmental action should not be countenanced by this Court.

II. The Decision Below Conflicts With This Court's Decisions Delineating The Basis Upon Which A Local Municipality May Exercise Its Police Power.

This Court has consistently held that in the area of economic regulations, local government enactments must bear a rational relationship to a legitimate governmental objective in order to be a constitutionally valid exercise of police power. Since all laws passed to promote the general

makes the pre-emption determination turn on the irrelevant consideration of how much printing work is available. Moreover, such a conclusion tacitly recognizes that the City's policy may indeed represent a coercive factor. Finally, we view this conclusion as being irreconcilable with the lower court's earlier conclusion that petitioners had demonstrated sufficient "injury in fact" to have standing in the instant case. 567 F.2d 1201.

welfare discriminate to a certain degree, it is only those that discriminate on an arbitrary basis which the Equal Protection Clause prohibits. In this regard, States are granted wide latitude in legislation which regulates economic matters. *Royster Guano Company v. Virginia*, 253 U.S. 412 (1920); *Reed v. Reed*, 404 U.S. 71 (1971); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

Despite the broad discretion granted to states in this area, and the presumption of validity such legislative acts enjoy, those which are wholly without rational nexus to a legitimate governmental objective are repugnant to the Equal Protection Clause of the Fourteenth Amendment. We submit that the union label requirement does nothing to further any legitimate governmental interest.

The Mayoral Order of 1934 was an *executive* pronouncement, unaccompanied by any of the procedural safeguards which normally support legislative enactments, such as findings of fact indicating the need for such a policy or the salutary effect such a policy would have. The sole and limited function of the Mayoral Order of 1934 was:

> . . . to lend the greatest measure of aid and assistance during the present economic Depression to those citizens of our City engaged in the various branches of the printing industry . . .

From this brief statement of intent contained in the Resolution's preamble, the Second Circuit was able to infer a comprehensive scheme to foster collective bargaining identical to that of the New York State Labor Relations Act, §§700 *et seq.* (McKinney, 1977). However, since the Mayoral Order preceded both of these Acts, the Court's *ex post facto* explanation is not persuasive.[4]

[4]The lower court concedes the absence of this purpose from the explicit language of the Order itself by stating: "At least, that is what we read into the preamble of the Resolution . . . ." 567 F.2d at 1203.

Moreover, the lower court's analysis in this regard completely misses the mark because it necessarily assumes that if the Mayoral Order would have passed constitutional muster at the time of its passage in 1934 then it is also valid now. In any constitutional analysis, however, it is axiomatic that due regard must be given to contemporary circumstances and conditions. Were this not the case, then the "separate but equal" doctrine announced by the Supreme Court in *Plessy v. Ferguson* 163 U.S. 537 (1896) would still be the law of the land. The Supreme Court recognized that constitutional law is evolutionary rather than static in *Brown v. Board of Education*, 347 U.S. 483 (1954) wherein it stated:

> In approaching this problem, we cannot turn the clock back to 1968 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the nation. *Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the law.* (Emphasis added) 347 U.S., at 492-493.

Gauged against contemporary standards, the Second Circuit's opinion must fall by force of its own terms. The lower court implicitly acknowledges the likely absence of a rational basis to support the Mayoral Order when it stated:

> Perhaps, as a matter of policy, favoring unionized employers should be reexamined by the responsible authorities, now that both the quality of printing and the wages paid may be roughly equivalent. (Citations omitted) 567 F.2d at 1203.

Thus, not only did the Second Circuit analyze this case against antiquated standards, but the decision on its face

clearly suggests the absence of any basis upon which to support the City's policy. Accordingly, we submit that the lower court's conclusion is patently erroneous. *See Abie State Bank v. Bryan*, 282 U.S. 765 (1931).

III. Both Federal and State Courts Have Questioned the Legality of Public Contracting Practices Restricting The Award of Public Contracts To Only Unionized Firms.

The issues involved in this case have received a great deal of attention from both Federal and State courts, many of which have raised questions as to the legality of restricting public contract bidding to unionized firms. *See, e.g., Master Printers Association v. Board of Trustees of Junior College District No. 508*, 356 F. Supp. 1355 (N.D. Ill. 1973) and cases cited therein.

For example, the lack of any justifiable rationale for distinguishing between an open shop and a unionized employer's shop in awarding public contracts was recognized in *Anthony P. Miller, Inc., v. Wilmington Housing Authority*, 165 F. Supp. 275 (D. Del. 1958). In this case, the plaintiff asserted that the City of Wilmington had the duty to let contracts solely to union labor in order to insure tranquility among various contractors working on the job. The court responded that such a policy would be in violation of public policy and found:

> [B]y the full weight of authority, a municipal corporation cannot discriminate in favor of organized labor. 165 F. Supp. at 275.

The Court also concluded that a local government has the duty to deal fairly with all its citizens:

> Government exists for the benefit of all. All are required to pay for the benefits of government, and finally, government has responsibility to all of the inhabitants alike. These appear to be the three main reasons assigned by the cases for almost uniformly holding invalid statutes directing the employment of union labor in connection with public works contracts. 165 F.Supp. at 280 (quoting *Teller on Labor Disputes and Collective Bargaining*, Volume 1, Section 171 at 516.)

As indicated in *Master Printers Association, supra*, there is a considerable body of state court case law holding union label policies on the part of municipalities unconstitutional. Additionally, numerous courts have held that to restrict the award of public contracts to unionized firms creates a monopoly among those firms which is both violative of the principles of competitive bidding, and repugnant to sound fiscal policy. *See, e.g., Mugford v. Mayor and City Council of Baltimore*, 185 Md. 266, 44 A.2d 745 (1946).

We find the restrictive policy involved in the case at bar as offensive to the principles announced in the above-noted cases as the requirements and assertions with which those courts were dealing. Thus, we submit that as a matter of policy, logic and law, the decision below should not be permitted to stand.

IV. The Second Circuit Has Placed Its Imprimatur On A Policy Which Fosters Anticompetitive Activity

Application of the Mayoral Order restricts the award of the City's printing contracts to a small fraction of its eligible bidders, namely, those whose employees have organized. Awards of municipal contracts on this arbitrary basis are in complete derogation of sound fiscal policy, and have the anomalous result of creating a monopoly among the City's unionized printing shops. Thus, although not raised below, we believe it is appropriate to note that the result reached below may well stand in direct conflict with a

decision handed down by this Court subsequent to the Second Circuit's decision in the case at bar.

In *City of Lafayette v. Louisiana Power and Light Co.*, 46 U.S.L.W. 4265 (March 29, 1978), this Court made clear that such artificial restraints on trade enjoy no exemption from the application of the federal antitrust laws. There it was held that apart from the *Parker v. Brown* 317 U.S. 338 (1943) "state action" exemption available to them as state agencies, cities are not excluded from the coverage of this country's antitrust laws. The Court stated:

> [I]f municipalities were free to make economic choices counseled solely by their own parochial interest and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protections would be introduced at odds with the comprehensive national policy Congress established. 46 U.S.L.W., at 4270.

In the case at bar, the facts indicate that the restrictive bidding policy of the City of New York was promulgated by fiat of Mayor Fiorello LaGuardia dated April 12, 1934; over the years, the policy was subsequently adopted by other city bureaucracies. The wholesale exclusion of an entire segment of an industry from the bidding process has, we submit, obvious anticompetitive effects on those excluded. Nevertheless, this union label policy was not promulgated by the municipality pursuant to a legislative mandate of the State. Thus, it would appear that under the decision in *City of Lafayette, supra,* the union label policy of the City of New York may constitute anticompetitive activity within the reach of the Sherman Act, 15 U.S.C. §§1 *et seq.*

CONCLUSION

For the foregoing reasons, and for the reasons set forth by Petitioners, this Court is respectfully requested to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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